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No.

In the
Supreme Court of the United States

JOSEPH W. SALADINO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an assurance of no "federal prosecution" provided by a cross-designated [State-federal] prosecutor, relied upon by petitioner when he pled guilty to Illinois felony weapon offenses, prohibited subsequent federal prosecution for the same weapon offenses in violation of the Due Process Clause of the Fifth Amendment?

2. Whether the blended [almost] six-year pre-and-post-indictment delay between petitioner's offense, State prosecution and federal arrest, based on a sealed federal indictment, was violative of the Fifth and Sixth Amendments?

3. Whether in light of *United States v. Booker*, 543 U.S. —, 125 S.Ct. 738 (2005), the petitioner's mandatory federal guideline sentence must be vacated and remanded for resentencing?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Joseph W. Saladino, Jr. (hereafter petitioner), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit was filed on December 6, 2004. App. 1-9; available in 2004 WL 2924179. No petition for rehearing was filed.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on December

6, 2004. App. 1-9, *infra*. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and the United States District Court for the Northern District of Illinois, Western Division, had jurisdiction pursuant to 18 U.S.C. § 3231.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES AND RULES

U.S. Constitution, Fifth Amendment

> No person shall be * * * [nor] be deprived of life, liberty or property, without due process of law * * *.

U.S. Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 922(g)(1)

> It shall be unlawful for any person [to possess a firearm] after having been convicted of a crime punishable by imprisonment for a term exceeding one year.

18 U.S.C. § 922(o)(1)

> Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

18 U.S.C. § 924(a)(2)

> Whoever knowingly violates subsection * * * (g) * * * of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both.

28 U.S.C. § 515(a) states:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. § 543(a) states:

> The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

28 U.S.C. § 544 states:

> Oath of Office. Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties.

STATEMENT

1. **Interrelated State Court Proceedings**: During the early morning hours of February 15, 1997, in Rockford, Illinois, petitioner was stopped for traffic violations. After failing roadside sobriety tests, he was charged with driving while intoxicated. Pursuant to a post-arrest inventory search, the trunk of petitioner's vehicle was searched which led to the recovery of two weapons in a locked duffle bag. Based on the above, petitioner was charged in the Winnebago Circuit Court (Illinois) with, *inter alia*, Illinois offenses prohibiting the possession of weapons after being convicted of a felony (his felony conviction was spread of record in 1964).

2. On February 13, 1998, petitioner, represented by counsel, entered an "open" guilty plea to the Illinois weapon offenses. That "open" guilty plea resulted from several conferences between the State prosecutor and petitioner's counsel. The State prosecutor had been occasionally "cross-designated" as an Assistant United States Attorney ("AUSA"). And, by virtue of that position, frequently communicated directly with the United States Attorney-in-charge of the Western District in Rockford, (see Affidavit of Prosecutor Mark Karner, Esq., App. 12-13, *infra*). Prosecutor Karner represented to petitioner's counsel that after conferring with the Attorney-in-Charge of the Western District—[that] there would be no federal prosecution based on petitioner's February 15, 1997 weapon/traffic arrest (Affidavit of Petitioner's attorney Jerry A. Lund, Esq., App.10-11, *infra*). Relying on that assurance from prosecutor Karner, petitioner pled guilty (absent a plea agreement). On April 8, 1998 petitioner was sentenced to two-years probation, conditioned upon alcohol abuse counseling, 200 hours of community service and a fine of $4,320.00. In April 2000, petitioner successfully completed his

probationary sentence (as confirmed in a later Federal Presentence Report, more *infra*).

3. **Federal Prosecution:** On February 12, 2002 (a day or two short of the expiration of the federal statute of limitations), petitioner was charged by the Special February 2002 federal grand jury, in Chicago (Northern District of Illinois, Eastern Division), with federal felony weapon offenses (felon-in-possession) pursuant to 18 U.S.C. §§ 922(g)(1), 922(o)(1) and 924(a)(2) (R. 1). Beyond peradventure, the Illinois and federal offenses were predicated on the same misconduct—petitioner's February 15, 1997 Winnebago County arrest where firearms were recovered from the trunk of his car.

On February 13, 2002 the government successfully moved that petitioner's indictment be sealed, and it remained "sealed" until January 16, 2003 when petitioner was arrested at his home in Rockford, Illinois (R. 2-3, 7-9).[1]

4. Petitioner, represented by new counsel, agreed with the U.S. Attorney in Chicago that the proper *venue* for petitioner's case was Rockford (Winnebago County), Illinois. Accordingly, on February 13, 2003, the district court in Chicago granted the parties joint motion to transfer this case to the Northern District of Illinois, Western Division (R. 14).

5. Upon appearing in the Western District, petitioner sought indictment dismissal predicated on, *inter alia*, the failure to afford a speedy indictment (and post-indictment delay). He further asserted that the government was

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[1] Thus, petitioner's federal indictment was returned 1,821 days after his state arrest, and the "sealed" indictment was served on petitioner 338 days thereafter (a total of 2,159 days—or about six-years—elapsed between his original arrest and the service/execution of this sealed federal indictment).

estopped from proceeding in this case because he [had] pleaded guilty to the same offense in February 1998, based on [a] "no-federal prosecution" pledge by the "cross-designated" State prosecutor Karner (Exh. to R. 31, App. 10-11, *infra*). The government opposed indictment dismissal and supported its position with attorney Karner's affidavit (R. 33, Exh. C; App.12-13, *infra*). The district court took the petitioner's motion and the government's opposition on the moving papers, and rejected petitioner's dismissal motion on November 19, 2003 (App. 16-19, *infra*).

On November 19, 2003, petitioner entered a conditional guilty plea, reserving his opportunity to challenge the district court's indictment dismissal rejection (R. 37-38). On March 25, 2004, the district court accepted the plea agreement and imposed a mandatory USSG sentence of 27 months (in pertinent part, App. 49, 57-58, *infra*). Within the fabric of the sentencing proceedings, the district court opined:

> This is an unusual case, and the government has every right to indict someone for the same conduct; although, they generally—it's really the exception that they do so, and, if they do so, it's normally done, in the few cases I've had it, soon after the offense was prosecuted in state court. I don't like both jurisdictions taking a shot at any defendant. I think it's just fair to take one court and prosecute. And then for the United States Government, with all its power, not only to take a second shot at him, but to do it five years later, it seems to me to be not in the best interests of the United States, and it gives the appearance of overreaching.
>
> Now, the government had some reason for doing this beyond, in my opinion, just the fact that they didn't like the probation that he got because if that

> was the only factor, the United States Attorney here, the supervising attorney, would have brought the prosecution. But somehow this came to the attention of somebody while some other investigation, the facts of which I know nothing about and have not been disclosed to me, they resurrect this case, and then they sit on the indictment for a year.
>
> All of that being said, it does not give the appearance of the proper exercise of the authority of the government, and, therefore, because of that, I am giving him the low end of the guideline range. * * *
>
> * * * * * * *
>
> In this circumstance, because of his medical condition, because the government waited six years before he was actually served with the indictment, I don't think the government is in any hurry in this case. *And, finally, there may be a point on appeal as it relates to the issue about the second indictment, after being told that there wouldn't be one.* I don't think the search and seizure issue is going anywhere, frankly, but you can always appeal it. *I don't know if the other issue is, but to me, it's the closest issue that some appellate court could take a look at it and say the government has gone too far.* * * *

App. 48-49, 50, *infra* (ital. emph. added).

After imposing the USSG sentence, the court considered release, pending appeal. Ultimately the district court eschewed ordering petitioner's release, pending appeal, but without government objection, enlarged petitioner's "surrender" date to January 18, 2005. Petitioner has

surrendered and is currently serving the imposed guideline sentence.

6. **U.S.C.A. 7 Proceedings:** Pursuant to his conditional guilty plea, petitioner prosecuted a direct appeal to the Court of Appeals for the Seventh Circuit. On December 6, 2004 the court of appeals affirmed the district court holding, *inter alia,* that the promise of "no federal prosecution" by the cross-designated local prosecutor was of no moment and not binding on the federal government. App. 4-5, *infra.* Further, the appellate court rejected the pre- and-post-indictment delay arguments finding no prejudice. App. 5-8, *infra.*

REASONS FOR GRANTING THE WRIT

1. This petition should be granted because over 93% of all State and federal criminal cases are resolved via guilty plea. Over three decades have passed since Chief Justice Burger penned the Court's position on unfulfilled promises within the fabric of guilty pleas:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when *a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*

Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495 (1971) (ital. emph. added).[2]

Notwithstanding the distinct *due process* concerns voiced by the Court, neither the district court nor the court of appeals ruled in a manner consistent with this Court's precedent.[3]

Here, petitioner advances that there is precious little difference, if any at all, between an assurance made by a "cross designated" local prosecutor that no federal prosecution would ensue were petitioner to plead guilty to Illinois felony weapon charges, as opposed to the U.S. Attorney or an AUSA providing the same pledge. What difference does it make that the "cross-designated" prosecutor conveyed the "no federal prosecution" assurance, as opposed to that

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[2] In *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680 (1987), Justice Brennan authored a dissenting opinion which included:

> The requirements of due process have guided this Court in evaluating the promises and conduct of state prosecutors in securing a guilty plea. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). There is no reason to ignore those requirements here.

483 U.S. at 13 (Marshall, Blackmun and Stevens, J.J.J., joining in Justice Brennan's dissent).

[3] During discovery segments of the district court proceedings, federal grand jury minutes were disclosed which revealed the realistic reason for federally prosecuting petitioner. As revealed by a grand jury FBI agent-witness, [the] "federal interests" had not been vindicated because of the sentence imposed in the State court (p. 10, n. 4 of Petitioner's opening U.S.C.A. 7 brief—quoting from pp. 13-14 of the federal grand jury report of proceedings dated February 12, 2002).

The government has not challenged this representation at any stage of this case.

assurance flowing from the lips or pen of the United States Attorney for the Western District (or his or her AUSA)?[4] Surely, within the context of the case at hand, it made no difference in that the affidavit of the local "and cross-designated" prosecutor clearly reflects that the federal government was not interested in prosecuting petitioner. App. 12-13, *infra*. And, it cannot be doubted that petitioner relied on the government's representation when he entered an "open" guilty plea to the Illinois felony weapon charges (Affidavit of Petitioner's then-counsel at App. 10-11 and district court findings, *infra*). And, the district court findings included [that] the prosecutor's representation "did influence defense counsel's decision to go ahead with the State prosecution," App. 17, *infra*.

Clearly, the cross-designated prosecutor acted with the knowledge and consent of the U.S. Attorney (in-charge) of the Western District, and therefore the government was bound by the proxy-promise of no-federal prosecution. Compare *United States v. Gebbie*, 294 F.3d 540, 549 (3rd Cir. 2002) (plea agreements negotiated on behalf of "the United States" obligates all U.S. Attorneys to honor them because every U.S. Attorney represents the government as a whole), *United States v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) (plea agreement that was ambiguous regarding reach of immunity precluded further charges in other federal courts), *United States v. Randolph*, 230 F.3d 243, 249-51 (6th Cir. 2000) (plea agreement barring further prosecution, although entered in Texas, also barred prosecution in Tennessee for charges that could not be brought in Texas; decision following remand, 24 Fed.Appx. 376, 2001 WL 1518757 (6th Cir. 2001)), and *United States*

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[4] Pursuant to 28 U.S.C. §§ 515(a), 543(a) and 544, the appointment of special or cross-designated prosecutors means that those so appointed carry the authority and responsibility of an AUSA.

v. Van Thournot, 100 F.3d 590, 594-95 (8th Cir. 1996) (promise in plea agreement made by the Assistant U.S. Attorney of the District of Wyoming to recommend concurrent terms binding on District Attorney in Southern District of Iowa).

Further, in *United States v. 25 Sandra Court, Sandwich, Illinois*, 135 F.3d 462 (7th Cir. 1998), the court, while affirming summary judgment in favor of the government in a civil forfeiture action, explained:

> It is certainly possible for the United States to "adopt" a state prosecution or to bind itself to the terms of a state's plea agreement. See *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994). But such a commitment requires much more than the mere participation of a federal agent in a state's investigation. *It requires the consent of the federal government, see id., or at least that of a state officer acting as the federal government's agent*, see *United States v. Long*, 511 F.2d 878, 880 (7th Cir. 1975), certiorari denied, 423 U.S. 895, 96 S.Ct. 196, 46 L.Ed.2d 128.

135 F.3d at 464 (ital. emph. added).

The court of Appeals principally relied on *United States v. Allen*, 930 F.2d 1270 (7th Cir. 1991) and *United States v. Fuzer*, 18 F.3d 517 (7th Cir. 1994), while rejecting petitioner's [cross-designated prosecutor] assurance *vel non* arguments. App. 5, *infra*. Neither support relief rejection in the case at hand. In *Allen*, the published decision reflects that he pled guilty to state charges arising from the same drug investigation and "somewhat cryptically," contended that his State guilty plea warranted dismissal of the federal charges. The affirming panel noted:

> Scott points to nothing in the record that indicates the plea agreement dealt with federal charges *or*

> *that any promises or commitments were made to the defendant with respect to federal charges.*

930 F.2d at 1274 (ital. emph. added). And in *Fuzer*, the court rejected similar relief, following successive State and federal prosecutions, where there was no intimation that the United States Attorney "was a party" to the agreement, 18 F.3d at 519.

But the case at hand is decidedly different: the State prosecutor, while not specifically "cross-designated" *in this case* (see 28 U.S.C. §§ 515(a), 543(a) and 544), nonetheless conferred with the United States Attorney-in-charge of the Western District and then related to petitioner's counsel that there would be no federal prosecution.

Once petitioner's counsel was so assured, an "open" guilty plea to the State weapon charges proceeded apace. Surely petitioner, lacking any understanding of nuanced State-federal separate sovereign concerns, had no reason to question the State-federal cooperation agreement. Compare *Finch v. Vaughn*, 67 F.3d 909, 915 (11th Cir. 1995) ("*Finch* not only was unable instinctively to appreciate the allocation of State and federal prosecuting and sentencing authority and he was given no reason to question that the two governments would not cooperate . . . .").[5]

No need to gild the lily: the facts are straightforward. And, in the last analysis, the question is plainly whether

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[5] The record is silent regarding the *Petite* policy, see *Petite v. United States*, 361 U.S. 529, 530-31 (1960) (*per curiam*). Petitioner acknowledges that the *Petite* policy confers no rights flowing to the defendant, and is an internal government guideline. Nonetheless, this case may provide a stark example of the government's failure to adhere to its internal policies; *Dual Prosecution and Successive Federal Prosecution Policies*, United States Attorney's Manual, 9-2.031 (2000) (describing mechanics of *Petite* policy).

defense counsel can rely on prosecutors to live up to their obligations and representations. As example, in *Shih Wei Su v. Filion*, 335 F.3d 119 (2nd Cir. 2003), the court reversed § 2254 rejection while discussing, *inter alia*, the *Brady* doctrine and whether defense counsel ought rely on the representations of an opponent within the fabric of the criminal justice system. The court explained:

> But even apart from that, the Supreme Court, in an analogous situation, has made clear that conscientious counsel *can* rely on prosecutors to live up to their obligations.

335 F.3d at 128 (italics in original). Thereafter, the *Filion* panel quoted from *Strickler v. Greene*, 527 U.S. 263, 286-87, 119 S.Ct. 1936 (1999) ("The presumption, well established by tradition and experience, that prosecutors have fully discharged their official duties is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.") (internal citations and quotation marks omitted)).

Hopefully, the government will forego electing to parse and quibble. Perhaps not. But the abiding principle that "[a] deal is a deal and the government's word must be its bond," must inform this Court's decision.[6] Given petitioner's unusual circumstances, but, in light of the recurrent successive State-federal prosecutions [for essentially the same offenses], this case may provide an appropriate vehicle for the resolution of the vexing questions that recur in successive State-federal prosecutions where the State prosecutions were resolved via [a] guilty plea.

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[6] The "deal is a deal" is cited from *San Pedro v. United States*, 79 F.3d 1055, 1076 (11th Cir. 1996) (dissenting opinion).

—♦—

2. In pertinent part the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial * * *."

The facts below are pristine.

a) On February 15, 1997 petitioner was arrested in Rockford, Illinois (Winnebago County), and charged with felonious possession of weapons (after having been convicted of an Illinois felony in 1964).

b) After several conferences between petitioner's counsel and the "cross-designated" State prosecutor (with an assurance of "no federal prosecution") petitioner proffered an "open" guilty plea to the State felon-in-possession charges (April 8, 1998). Petitioner was sentenced to two years probation with multiple conditions which included alcohol counseling, community service and the payment of a $4320 fine. Petitioner paid the fine and successfully completed his Winnebago county probation during April 2000.

c) On February 12, 2002, petitioner was charged with federal violations (felon-in-possession) emanating from the same offense. On February 13, 2002, and thereafter, petitioner's indictment was sealed on the government's motion (R. 4-5).[7]

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[7] The government's "sealing" importunings disclosed only that there was an ongoing, unrelated federal grand jury investigation and were the indictment not "sealed" prejudice to the government might ensue (R. 4). The government's second "sealing" motion repeated that an undisclosed, unrelated investigation was ongoing (April 16, 2002; R. 5). Now, an additional two years have elapsed and nothing has come forward to justify the government's *ex parte* "sealing" filings.

d) On January 16, 2003 the indictment was "unsealed" and petitioner was arrested at his home in Rockford, Illinois (R. 7-9). At all times pertinent petitioner was known by his given name and resided at the same address in Rockford, Illinois. Calendar calculations reveal that the service and execution of the federal indictment occurred *one month short of six years after the triggering events—[the] February 15, 1997 traffic-weapons seizure arrest.*

In due course petitioner sought indictment dismissal based upon the unwarranted delay between his original arrest, the conclusion of the State charges, the "sealed" federal indictment and his arrest (R. 31). The government opposed indictment dismissal predicated on pre-and-post-indictment delay asserting, *inter alia*, that petitioner had not demonstrated any prejudice (R. 33 at pp. 4-5). On November 19, 2003 the district court rejected petitioner's constitutional plaints again, explaining, that the petitioner had not shouldered his prejudice-burden (R. 39, App. 17-19, *infra*). Within the U.S.C.A. 7 affirmation, the court rebuffed petitioner's speedy trial plaints (both pre-and-post-indictment) noting that under established precedent, petitioner [must show] "substantial prejudice to his right to a fair trial." App. 7-8, *infra*. And, regarding post-indictment delay the court analyzed the quartet of *Barker v. Wingo*, 407 U.S. 514 (1972) criteria concluding that the eleven-month post-indictment delay was justified because the government had a legitimate reason for "sealing" the indictment. App. 6-8, *infra*.

In *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992), the Court examined and modified the *Barker*

inquiries.[8] In *Doggett*, the Court held that under the Sixth Amendment, an eight-and-one-half-year delay between indictment and trial accorded the defendant a plane of *presumed prejudice* warranting indictment dismissal. This Court clarified how the quartet of [*Barker*] factors used to analyze a defendant's Sixth Amendment speedy trial claim based on a post-indictment delay are weighed, and the burden each party carries. The initial inquiry is whether the delay was long enough to trigger a "speedy trial analysis." *Id.* at 651-52. Ordinarily it accepted that a post-accusation delay approaching one year is adequate. *Id.* at 652, n. 1.

The balance of the factors, the length of the delay, the reason for the delay and defendant's diligence in asserting his or her rights is weighed against the prejudice to the defendant. *Id.* at 656-57. It is clear from *Doggett* that the longer the delay the greater the presumption of prejudice and, prejudice is presumed in some cases, relieving the defendant of any burden to show actual prejudice. *Id.* at 656-57. The Court further explained that "different weights are to be assigned to different reasons for delay," 505 U.S. at 657. Where the government diligently pursues a defendant from indictment to arrest, a speedy trial claim will always fail without a showing of actual prejudice. On the other hand, if "the Government had intentionally held back in its prosecution . . . to gain some impermissible

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[8] The *Barker* prejudice prong has a trio of components: (i) to prevent oppressive pretrial incarceration; (ii) to minimize the anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired, 407 U.S. at 530. *Barker* and *Doggett* were the subject of extensive analysis in *Jackson v. Ray*, 390 F.3d 1254, 1260-67 and nn. 2-4 (10th Cir. 2004) (affirming rejection of relief pursuant to 28 U.S.C. § 2254 where issue on review related to speedy trial).

advantage at trial," that weighs heavily against the government. *Id.* The Court explained that:

> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.

505 U.S. at 656-57. The Court also noted:

> "[w]hen the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review, and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief."

505 U.S. at 658 (footnotes and citations omitted). Finally, in *Doggett*, even though the defendant was unaware of the indictment and was unable to demonstrate *actual prejudice*, that factor was not fatal in that the weight of the composite facts warranted a presumption of prejudice. *Id.* at 657-58 (ital. emph. added; see, *e.g.*, *Moore v. Arizona*, 414 U.S. 25, 27, 94 S.Ct. 188 (1973) ("Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial[.]").

In the case at hand, the government was clearly negligent (to say the least) in failing to pursue the federal case against petitioner, waiting 1,812-days to seek the federal indictment and another 338-days thereafter to unseal the indictment and arrest petitioner. Those circumstances mandate the Sixth Amendment's presumption of prejudice (per *Doggett*).

Sister circuit decisions examining *Doggett* include *United States v. Bergfeld*, 280 F.3d 486 (5th Cir. 2002) and *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002). In *Bergfeld*, the district court rejected the defendant's indictment dismissal motion where the underlying facts giving rise to the federal charges occurred in 1992. A federal grand jury returned a multi-count indictment against *Bergfeld* and others on June 7, 1995 but did not "unseal" the indictment until on or about September 10, 2000. *Bergfeld* was arrested shortly thereafter, and moved for indictment dismissal contending the delay between the indictment and trial violated his "Sixth Amendment" right to a speedy trial, 280 F.3d at 487-88. After the district court denied the speedy trial motion, the defendant pled guilty while reserving his right to challenge the rejection of his speedy trial plaint. The court analyzed *Doggett* and determined that the government's delay fell within *Doggett* "official negligence" category but because the district court improperly analyzed the "prejudice" factor, the court reversed. While explaining the *Doggett* rationale, the reviewing court determined that the district court erred in its *Doggett* analysis—the district court started with the absence of specific evidence of prejudice—as opposed to looking to the length of the delay and the reason for the delay which gives rise to a presumption of prejudice, 280 F.3d at 490-91. In the end the court held that the five-year delay caused by the government's negligence entitled *Bergfeld* to a presumption of prejudice warranting indictment dismissal. *Id.* at 491.

Similarly, in *United States v. Cardona*, 302 F.3d 494 (5th Cir. 2002), the court considered the following facts: On April 23, 1995, *Cardona* and others were indicted in Texas for cocaine conspiracy offenses. A warrant issued for his arrest but he was not arrested until October 28, 2000; 302 F.3d at 496. *Cardona* moved for indictment dismissal regarding the delay in executing his arrest warrant which

(according to *Cardona*) violated his right to a speedy trial. The court reversed and ordered the indictment be dismissed while analyzing the *Doggett* factors including, *inter alia*, the presumption of prejudice. *Id.* at 498-99.

In this case the district court rejected petitioner's motion for indictment dismissal and addressed the proposition that he had failed to show prejudice (App. 18-19, *infra*). In a nutshell, the district court failed to correctly calibrate *Doggett* into its speedy trial-Sixth Amendment analysis. Had the lower courts correctly evaluate[d] *Doggett*, it would have (and should have) held that the "presumed" prejudice was such that petitioner did not bear the burden of demonstrating actual and substantial prejudice—because—that prejudice (as in *Doggett*, *Bergfeld* and *Cardona*) is, and was, "presumed." Thus, the district court's decision, supported by appellate affirmation, was clearly wrong and should be reversed.

—♦—

3. Whether in light of *United States v. Booker*, 543 U.S. —, 125 S.Ct. 738 (2005), the petitioner's mandatory Federal Guideline Sentence must be vacated and remanded for resentencing?

On March 25, 2004 petitioner, pursuant to his guilty plea, was sentenced to [a] *mandatory federal guideline sentence of 27 months* (impacting segments of judgment and commitment order reproduced at App. 56-58, *infra*). According to 18 U.S.C. § 924(a)(2) petitioner could have been sentenced to a fine, or not more than ten years, or both. Thus, petitioner could have been sentenced to a fine, probation, or a sentence of federal immurement. See *United States v. Pabon-Cruz*, 391 F.3d 86, 102-03 (2nd Cir. 2004) (analyzing "Enrolled Bill Rule/Doctrine" while considering legislative history and statutory language of an antecedent provision of 18 U.S.C. § 2251(d) concluding that "or both" means that a fine or probation remains a

sentencing option). Justice Stevens' majority opinion in *Booker* clearly impacts the sentencing in this case because the district court felt that the mandatory sentencing guidelines demanded a prison sentence (plain error; *Johnson v. United States*, 520 U.S. 461, 467-68, 117 S. Ct. 1544 (1997)).

While surely the last word has yet to be written (or voiced) regarding *Booker/Fanfan*, it is clear that the *mandatory* imposition of a sentence pursuant to the Federal Sentencing Guidelines is no longer valid. And, while Justice Breyer's majority opinion includes the admonition that the guidelines remain "advisory," that, standing alone, invites remand and resentencing to provide the district court with the initial opportunity to determine the reasonableness of petitioner's sentence. Hence, as to this issue, the January 12, 2005 *Booker/Fanfan* decision should culminate in the granting of the writ, vacation of the judgment below, and remandment for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Allan A. Ackerman
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Attorney for Petitioner
Joseph W. Saladino, Jr.

App. 1

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 5,2004
Decided December 6.2004

Before

Hon. FRANK H.EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge

No. 04-1831

	) Appeal from the United States
	) District Court for the Northern
	) District of Illinois, Western
	) Division
United States of America,	)
Plaintiff-Appellee,	) No. 03 CR 50016
	)
v.	) Philip G. Reinhard, Judge
	)
Joseph W. Saladino,	)
Defendant-Appellant.	)

ORDER

Joseph Saladino, a felon, was arrested in Rockford, Illinois on February 15, 1997, for driving under (he influence. A search of his car revealed several handguns in his trunk, including an automatic pistol. He pleaded guilty in Illinois state court to the possession of these guns and received two years' probation. Several years later, shortly before the federal limitations period ended, the United States filed an indictment against Saladino under the federal felon-in-possession of a firearm statute, 18 U.S.C. § 922(g)(l), and the federal statute relating to possession of machine guns, 18 U.S.C. § 922(o)(l), based on the same incident. Saladino was then arrested and eventually

entered a conditional plea of guilty to both counts. Saladino appeals, claiming that the federal charges cannot stand because the federal government promised to forego the charges. He also contends that pre-indictment and post-indictment delays prejudiced him. We affirm.

I.

The facts relating to Saladino's crime in this case are not in dispute. The Illinois State Police stopped Saladino in the early morning hours of February 15, 1997, in Rockford, Illinois for erratic driving. After observing slurred speech and Saladino's inability to recite the alphabet, an Illinois state trooper arrested Saladino for driving under the influence of alcohol. The trooper then conducted an inventory search of Saladino's car, during which he discovered three firearms in the trunk. Specifically the trooper found: (1) a .357 Colt Magnum revolver; (2) a .380 Auto Caliber Colt semi-automatic pistol; and (3) a 9 mm Luger caliber Cobray machine pistol without a serial number. The trunk also contained a 33-round clip for the automatic pistol, over 400 rounds of ammunition for the guns, two books about making silencers, a book on machine lathes, a billy club, two "slim jims," two bolt cutters, a tree trimming saw, one butcher knife, a pipe wrench, a stocking cap, and two face masks.

Because Saladino had a 1964 felony conviction of rape, he was subject to both state and federal charges of felon-in-possession of a firearm. Illinois charged him in the Circuit Court of Winnebago County with Unlawful Use of Weapon by a Felon, 720 ILCS § 5/24-1.1, and also referred the matter to the United States Attorney's Office in Rockford. The U.S. Attorney's Office chose not to pursue the matter at that time and informed the state prosecutor, Mark Karner, of that intention. Karner then told Saladino's attorney that he had discussed the matter with the U.S. Attorney's Office and that Karner did not believe that the U.S. Attorney's Office would prosecute Saladino on the federal charges.

On February 13, 1998, Saladino entered into an "open" plea agreement in the state court. Saladino agreed to plead guilty to Unlawful Use of Weapons by a Felon and, in exchange, the prosecution would not make a sentencing

recommendation. The state prosecution also agreed to dismiss the companion charges against Saladino, such as driving under the influence. The state court judge conducted a plea colloquy during which he inquired into Saladino's knowledge and understanding of this agreement. At two different points in this colloquy, the judge specifically asked Saladino whether he relied on any other promises or inducements when entering into the plea agreement. Both times, Saladino responded that he had not relied on anything outside the plea agreement. There were no references to the federal government or federal charges in either the plea agreement or the plea colloquy. The stale court judge sentenced Saladino to two years' probation, alcohol abuse counseling, community service, and a fine.

While the state prosecution had concluded, Saladino was not home free. During an unrelated 2001 investigation, the U.S. Attorney's Office in Chicago conducted a background check on Saladino, which revealed both the 1997 arrest and the state court's sentence of probation. On February 12, 2002, a grand jury indicted Saladino for: (1) violation of 18 U.S.C. §§ 922(g)(l) and 924(a)(2); and (2) violation of 18 U.S.C. §§ 922(o)(l) and 924(a)(2). The first count, pursuant to 18 U.S.C. §§ 922(g)(l) and 924(a)(2), charged Saladino with being a felon in possession of firearms, while the second count, pursuant to 18 U.S.C. §§ 922(o)(l) and 924(a)(2), charged Saladino with possession of a fully automatic machine pistol. To prevent Saladino from discovering the ongoing investigation, the government moved to seal of the indictment, which (he Northern District of Illinois, Eastern Division granted.[1] Nearly a year later, on January 16, 2003, officers arrested Saladino, and the indictment was unsealed. By agreement of the parties, on February 13, 2003, the case was transferred from Chicago to the Western Division of the Northern District of Illinois in Rockford.

Saladino initially moved to suppress the physical evidence found in the 1997 search, but the district court denied the motion. Saladino subsequently moved to

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[1] The government made a subsequent motion to extend the "sealing" of the indictment, which the district court granted.

dismiss the indictment on multiple grounds: (1) the U.S. Attorney's Office in Rockford made a promise" to Saladino that it would not pursue federal charges; (2) the pre-indictment delay prejudiced Saladino's right to a fair trial; and (3) the post-indictment delay prejudiced Saladino's right to a speedy trial. The district court issued a minute order, which it later elaborated upon in open court, denying the motion to dismiss the indictment, Saladino then entered a conditional plea of guilty to both federal charges, reserving his right to appeal. The court sentenced Saladino to concurrent terms of twenty-seven months' imprisonment.

II.

On appeal, Saladino challenges the district court's denial of his motion to dismiss the indictment. Saladino repeats his arguments that the federal government made a binding promise not to prosecute as part of the state plea agreement and that the various delays in his federal prosecution prejudiced his rights. Saladino also contends, for the first time, that the sealing of the indictment was improper.

A.

Saladino initially argues that the federal government made a binding promise to Saladino not to pursue the federal charges as part of the state court plea agreement. Plea agreements are construed according to general contract principles. *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir. 1992). The terms of Saladino's plea agreement are factual issues for the district court, which this court will only set aside if clearly erroneous. *United States v. Williams*, 198 F.3d 988, 992 (7th Cir. 1999). This court reviews the contract for any ambiguity de novo. *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992). In this case, the state court plea agreement has no effect on a subsequent federal prosecution. The plea agreement merely details the obligations of Saladino and the state prosecutor regarding the pending state court charges. The text does not address a federal prosecution at all. The plea agreement does not impose any obligations on the federal government or even mention any federal charges.

No promises or commitments regarding any potential federal claims were made. Moreover, in general, the federal government is not bound by the terms of a state court plea agreement. See *United States v. Allen*, 930 F.2d 1270, 1274 (7th Cir. 1991). In this case, the plea agreement bound the state to dismiss its charges, but it had no effect on the federal government.

Saladino, however, attempts to bind the federal government to the representations of the state court prosecutor regarding federal prosecution. According to his affidavit, Karner, the state court prosecutor, stated that he believed that the federal government would not pursue charges and communicated this opinion to Saladino. First, Karner did not make any promise regarding federal prosecution, but simply relayed his belief that the federal government would not pursue charges. Moreover, Karner, the state's attorney, had no authority to bind the federal government. *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994) ("[Es]tate prosecutors cannot bind federal prosecutors without the latter's knowledge and consent.").

Furthermore, the colloquy conducted by the state court judge rebuts Saladino's contention. The state court judge repeatedly asked Saladino whether the guilty plea was prompted by any promises outside of the plea agreement. Saladino responded that there were no other promises that he relied upon when making the deal. Saladino's alleged misunderstanding of the terms and the effect of the state plea agreement cannot stop the federal government's later prosecution of him. *Allen*, 930 F.2d at 1274.

B.

Saladino next contends that the pre-indictment delay of nearly five years prejudiced him, violating his due process rights. We review the district court's denial of Saladino's claim of a due process violation arising out of pre-indictment delay for an abuse of discretion. See, e.g., *United States v. Henderson*, 337 F.3d 914,919 (7th Cir. 2003). "For a defendant to successfully assert a due process violation based on an unjustified pre-indictment delay, he must first show that the delay caused actual and substantial prejudice to his right to a fair trial." *United States v. Spears*, 159 F.3d 1081, 1084 (7th Cir. 1998).

Saladino fails to point to any prejudice from the pre-indictment delay, much less specific and concrete prejudice. *Id.* ("Allegations of prejudice must be specific, concrete, and supported by the evidence.") Instead, Saladino only provides a description of several legal decisions relating to the subject. This is not sufficient. Saladino has provided no factual basis on which this court can rule. It is for Saladino, not this court, to craft his argument. *United States v. Williams*, 877 F.2d 516,518-19 (7th Cir. 1989). Saladino has, therefore, waived the pre-indictment delay issue. See. e.g., *United States v. Mason*, 974 F.2d 897, 901 (7th Cir. 1992) ("Without a factual or legal basis before us, we will not consider his bare allegation"); *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000); *Williams*, 877 F.2d 518-19; Fed.R.App.P. 28(a)(9)(A).

C.

Saladino next claims that the post-indictment delay of eleven months violated his right to a speedy trial. In reviewing the district court's determination that the delay did not infringe Saladino's speedy trial right, we examine the four criteria set forth in *Barker v. Wingo*, 407 U.S. 514, 530(1972): (1) whether delay before trial was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as the delay's result. See *Doggett v. United States*, 505 U.S. 647, 651 (1992).

None of the factors are dispositive. See *Barker*, 407 U.S. at 533. The Supreme Court has noted that the need for specific evidence of prejudice, the fourth factor, may be less when the first three *Barker* factors weigh heavily in the defendant's favor. See *Doggett*, 505 U.S. at 654-56. In *Doggett*, for example, the Supreme Court presumed prejudice from an eight and a half year delay, excusing *Doggett* from showing specific examples of prejudice. *See id.* at 653-54. The Supreme Court, however, also indicated that the success of a speedy trial claim hinged, to a great extent, on the government's conduct.

> If the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great (he delay, so long as Doggett could not show specific prejudice to his defense.

Id. at 656.

Against this backdrop, we consider the four *Barker* criteria. First, we turn to the length of the delay. The inquiry into the length of the delay serves two purposes: acting as the gatekeeper to the speedy trial analysis, as well as one of the factors used to determine whether a violation occurred. *See id.* at 651. If the delay is not excessive, the speedy trial inquiry ends there and does not proceed to a balancing of the other factors. *See id.* at 651-52. The district court here did not abuse its discretion when it found that the eleven month delay did not violate Saladino's right to a speedy trial. It appears that the eleven month delay could qualify as unreasonably long under *Doggett*, which provided that delays "approaching a year" generally trigger the speedy trial analysis. *See id.* at 656, n 1.

The analysis, however, does not get much further. While Saladino is not responsible for either causing the delay or failing to assert his speedy trial right, the second and third factors in the analysis, the government acted with reasonable diligence. The government delayed only to protect its investigation, which would have been compromised if the indictment had been unsealed earlier. This was a legitimate purpose, not government negligence. *Cf, United States v. Hayes*, 40 F.3d 362, 365-66 (11th Cir. 1994). This, by itself, is sufficient under *Doggett*. See *Doggett*, 950 U.S. at 656.

Examining the final criterion, prejudice, Saladino does not counter with examples of specific prejudice to his defense caused by the delay, choosing instead to rely on a presumption of prejudice. Such reliance is misplaced. This was not a case of a multi-year delay in which prejudice would necessarily permeate all aspects of a later defense) as in *Doggett*. Even in cases of lengthy delays, "such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria. . ."

Id. Here, the delay period was relatively short (barely triggering the analysis) and the reason for delay was legitimate. Therefore, the district court did not abuse its discretion in weighing the factors and concluding the delay did not impinge on Saladino's right to a speedy trial.

D.

Saladino's final challenge on appeal is that the district court improperly sealed the indictment. As he did not raise this issue in the district court, we review for plain error. *United States v. Gray*, 332 F.3d 491,492 (7th Cir. 2003). "Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is `plain,' and (3) that affects substantial rights if all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the errors seriously affects the fairness, integrity, or public reputation of the judicial proceedings" *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (internal citations omitted). Here, there was no error. The motion to seal was proper under Fed.R.Crim.P. 6(e)(4), which allows a judge to keep an indictment secret until a defendant is in custody, given the government's stated desire to protect the ongoing investigation.

III.

We do not doubt that Saladino believed that he would not be prosecuted by the federal government on the felon gun possession charges. Unfortunately for him, the federal government did not make any promise to that effect and later decided to prosecute. Neither this nor the delay in prosecution justify setting aside the indictment.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 6, 2004

BEFORE: Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable DIANE S. SYKES, Circuit Judge

No. 04-1831

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JOSEPH W. SALADINO,
Defendant - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Western Division
No. 03 CR 50016, Philip G. Reinhard, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

STATE OF ILLINOIS)
) SS
COUNTY OF WINNEBAGO)

AFFIDAVIT

1. My name is Jerry A. Lund, an attorney licensed to practice in the State of Illinois.

2. I represented Joseph W. Saladino for the offense of Unlawful Possession of a Weapon by a Felon on 97CF354.

3. Said charge was prosecuted by Assistant States Attorney Mark Karner of the Winnebago County State's Attorney Office.

4. While said cause was pending, I was told by Attorney Karner the case was being reviewed by the Rockford Office of the United States Attorney's Office to determine if the case would be prosecuted in federal court.

5. After several agreed continuances between Attorney Karner and myself, I was told by Attorney Karner, the U.S. Attorneys Office would not proceed with federal charges.

6. After the information was conveyed to me, a plea was entered by the Defendant.

7. The Defendant entered a open plea to 97CF354 and was sentenced on April 8, 1998.

8. I was subsequently notified that Joseph Saladino was arrested on federal charges alleging the same conduct previously alleged in case # 97 CF354.

9. I subsequently had two conversations with Attorney Mark Karner, the last occurred on September 4, 2003. He confirmed that he had reviewed his file and he had been told by the U.S. Attorney Keith Seiffert that the U.S. Attorney's Office in Rockford would not prosecute. This conversation occurred while the state charges were pending. Attorney Karner also confined that this information was conveyed to me while I represented Joseph Saladino on 97 CF 354.

/s/ Jerry A. Lund

JERRY A. LUND

SUBSCRIBED and SWORN to before me
this 8th day of September, 2003.

/s/ Kim Selgren

NOTARY PUBLIC

[OFFICIAL SEAL]

VELLA & LUND, P.C.
401 West State Street. Suite 300
Rockford, Illinois 61101
(815) 965-7979

STATE OF ILLINOIS)
) SS
COUNTY OF WINNEBAGO)

AFFIDAVIT

1. My name is Mark Karner. I am employed as an Assistant Deputy State's Attorney in Winnebago County, Illinois. I have been a prosecutor in the Winnebago County State's Attorneys Office since December 1988.

2. As an assistant state's attorney, I was assigned to prosecute a defendant named Joseph Saladino in case number 97 CF 354 for two weapon offenses. During the pendency of this case, I had periodic contact with the defendant's attorney Jerry Lund.

3. On February 13, 1998,1 appeared before Circuit Judge Michael R. Morrison along with the defendant and Mr. Lund to present a plea agreement. In that agreement, the defendant entered an open plea of guilty to the crime of Unlawful Possession of a Weapon by A Felon. This offense was charged in Count I of the Bill of Indictment. In exchange for the defendant's guilty plea, I agreed to dismiss Count II of the Bill of Indictment which charged the offense of Violation of the Firearm Owners Identification Card Act. I also agreed to dismiss all pending misdemeanor charges that were filed by the Winnebago County State's Attorneys Office against the defendant. In addition, I agreed with defense counsel that the defendant was eligible for a sentence of probation under Illinois law. I also agreed to refrain from making a specific sentencing recommendation and to not introduce any evidence in aggravation outside of the statement offacts contained in the Presentence Investigation Report. I made no other promises as part of this plea agreement.

4. In addition to my responsibilities as an Assistant State's Attorney, I held the appointed position of Special Assistant United States Attorney in 1998. This appointment was an unpaid position that provided me with limited involvement in certain types of federal investigations and prosecutions. As a Special Assistant United States Attorney, I worked under the direct supervision of

Assistant United States ("AUSA") Attorney Keith Syfert. As a Special Assistant United States Attorney, I worked with the understanding that I could not unilaterally enter into plea agreements on behalf of the United States.

5. At some point, during the pendency of case number 97 CF 3541 had discussions with AUSA Syfert about the possibility of initiating a federal prosecution against the defendant. At some point, it became apparent to me that the defendant was not going to be prosecuted federall)

6. During the pendency of 97 CF 354, I informed Mr. Lund that I had consulted with the U.S Attorneys Office about the possibility of filing federal charges against the defendant. At no time, did I promise Mr. Lund, the defendant or Judge Morrison that the defendant would not be charged federally in exchange for his guilty plea to Count I of the Bill of Indictment in 97 CF 354. I did not have the authority to make such a promise. I merely informed Mr. Lund that it was my understanding and belief that the defendant was not going to be prosecuted federally.

7. During all of my court appearances in case number 97 CF 354, I acted solely in my capacity as a Winnebago County Assistant State's Attorney.

/s/ Mark Karner

Mark Karner

SUBSCRIBED & SWORN to before me this
30th day of October, 2003.

/s/ Rebecca Streit [Official Seal]

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	) Docket No. 03 CR 50016
Plaintiff,	) Rockford, Illinois
v.	) Wednesday
	) November 19, 2003
JOSEPH SALADINO,	)
Defendant.	) 1:30 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES

For the Government:	HON. PATRICK J. FITZGERALD United States Attorney (308 West State Street, Suite 300, Rockford, IL 61101) by MR. MICHAEL F. IASPARRO Assistant U.S. Attorney
For the Defendant:	MR. JAMES W. REILLEY (2015 S. Arlington Heights Road, Arlington Heights, IL 60005)
Court Reporter:	Mary T. Lindbloom 211 South Court Street Rockford, Illinois 61101 (815) 987-4486

THE CLERK: 03 CR 50016, U.S.A. v. Saladino.

MR. IASPARRO: Good afternoon, your Honor. Michael Iasparro for the United States.

THE COURT: Good afternoon.

MR. REILLEY: Good afternoon. Judge. James Reilley for Mr. Saladino, who is also present.

THE COURT: Good afternoon. All right. This matter has been set, I guess, by the government. I had previously sent both of you a minute order in which I had preliminarily ruled on the motion to dismiss, but when I say preliminarily, I wanted to give the defense counsel a chance, if he felt it appropriate, to present any further testimony, if that was necessary, and to explain my reasons why I preliminarily denied the motion.

So, I guess you set this today because I had ruled on the motion, at least preliminarily, and then I had indicated the case was set for trial previously on the 2nd of December, and it's been set then by you to come in today. Are you asking for an explanation then of my reasons?

MR. REILLEY: Yes, Judge. May I respond to your statement?

THE COURT: Go ahead.

MR. REILLEY: I do have your order. I have read the order. I've spoken to the government about it. I feel that the record that has been made in terms of the affidavits and the motions and the documents that we attached is adequate for the court to make an appropriate ruling. The government has chosen to respond without an affidavit from what I would consider to be the main witness in the case. However, be that as it may, that's the record before the court. I'm not asking for a hearing, but I would ask for the court to, as your order stated, to explain your ruling for the record.

THE COURT: All right. And I'm willing to do that, obviously. I did put it down in my minute order that there could be an evidentiary hearing, if you desired it, but it seems to me, as you say, that the affidavit of Attorney Lund stands by itself and that there's also -- I believe

there's an affidavit by Assistant State's attorney Karner.

MR. REILLEY: That's correct.

MR. IASPARRO: That ' s correct, Judge .

THE COURT: And I think both of those affidavits address the issue, and I don't think they're in conflict. That's why I gave just the slight opening that if you wanted an evidentiary hearing. But I don't feel that they're in conflict. Do you?

MR. REILLEY: No, sir, I don't.

THE COURT: All right. Then I'm ready to rule on the motion to dismiss. My findings of fact and law will stand for—the transcript of that will stand for my findings of fact and conclusions of law.

First, as to the enforceability of a promise not toprosecute, I disagree somewhat with the government's position. There are some promises, if made, that may be enforceable if there is some detrimental reliance, and LaFave on Criminal Procedure, Section 13.5(b). Volume IV, explains that. And there are two Seventh Circuit cases. United States v. Alien at 930 F.2d, United States v. Long, 511 F.2d.

And essentially both of those cases, while not directly in point, there was an argument that was made by the defendant's lawyer in at least the Alien case, and the government -- the court wound up saying and concluding that the federal government was not a party to the state plea negotiation and points out that the defendant points to nothing in the record that indicates the plea agreement dealt with federal charges or that any promises or commitments were made to the defendant with respect to the federal charges and concludes also that there was no allegation that state officials were acting on behalf of the federal government for purposes of the plea negotiation. Therefore -- well, they also say in general the federal government is not bound by a plea agreement entered into in state proceedings.

Reviewing the affidavits and the allegations made in the motion to dismiss, I believe that the affidavits hereestablish, at best, that the government has made a decision at one time not to prosecute the defendant and

that that was communicated to the defendant by an Assistant State's Attorney. However, it's clear from the submissions to me that that decision not to prosecute was not part of the plea bargain which resulted in defendant's guilty plea to the same charge in state court. The transcript of that plea hearing clearly does nothinge on or even recite the decision of the government not to prosecute nor does the affidavit of defendant's then counsel,Mr. Lund, make that representation.

Thus, there's not an unequivocal promise by a government prosecutor not to prosecute in return for the guilty plea in state court, and there's nothing in that plea agreement that recites that the plea agreement in state court, as a part of it, there would be~ no prosecution in federal court. And although there's an allegation that Karner is a Special Assistant U.S. Attorney for certain purposes, Karner recites that in these circumstances he was not acting in that capacity.

So, my bottom line conclusion is that while I believe that the decision not to prosecute by the government was a decision that was made and was communicated by the Assistant State's Attorney, and it may have influenced Lund's—probably did. I'll find it did influence Lund's decision to go ahead with the state prosecution. It was not a part of the plea bargain, and, therefore -- and not made by a representative as an unequivocal part of the plea bargain in the state prosecution.

Had things been different and it had met some of the criteria set forth in the Alien case, then I believe there can be detrimental reliance, but here the government is not bound by that, and, therefore, as to that basis, I find that I would not dismiss the prosecution.

It doesn't mean I agree with the way it was handled. I think there is -- but that should have been clarified a long time ago, long before you got in the case, counsel, and if it was a part of the plea agreement, then it should have been made an express part. And I'm not criticizing Lund. I just think that decisions were made. We look back on it in hindsight, and there is not a legal basis I find for dismissal.

As to the second and third points in the motion to dismiss of delay in the indictment, which occurred almost

five years from the date of the state arrest, and the delay in the federal arrest once there had been an an indictment —that took about eleven months from the date of the indictment to the arrest—both of those are decided essentially the same way by me.

First, as to the preindictment delay, the defendant has the burden, and that's set forth in United States v. Hunter, and the defendant has the burden to show that in some concrete, specific way that the delay caused actual and substantial prejudice to his rights to a fair trial, and here at least you don't get that because there's no actual orsubstantial prejudice under specific facts which would show that there's any prejudice other than the fact of the delay.

There is nothing that defense counsel pointed to to show that type of prejudice. If you had shown prejudice, then the burden would shift to the government to show that the purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason, and I don't have to get to that secondary burden because I find that there are no facts which would show that there's any specific harm or prejudice shown.

Again, I've been critical of the government in other cases where there's been a substantial period of time from when they know of an offence to the time of indictment, and I don't like the delay here, either, the day before the Statute of Limitations. And this is a simple offense. The govern ment could have prosecuted easily at an earlier date. Now, the government may have had other reasons why they didn't go forward, and I think you allude to it, that there was some ongoing investigation that you had for other charges. I still believe that a defendant should be prosecuted soon after the offense as possible. Again, I find, though, that there's no prejudice shown in this case by the delay.

As to the eleven-month postindictment delay in the arrest of the defendant and notifying him of the indictment, in this regard the right to a speedy trial has been analyzed in the Seventh Circuit under United States v. Mitchell at 957 F.2d. They've applied the factors in the U.S. Supreme Court case of Barker v. Wingo, looking at the length of the delay between the indictment and trial,

and here there's only eleven months from the time of the arrest. Also, the reason for the delay, here I find it's not the defendant's fault, but it is reasonable that the government has said that it would have hampered an existing investigation. So, the eleven-month delay, at least for those reasons, I find there is a reason for it.

The timeliness of defendant's assertion of the right. I think it's soon enough that they've made their objection. It could have been made ,a few months sooner, but it's timely, and the prejudice suffered is probably the key factor, and there's no specific facts concerning any prejudice. So, on that basis I would deny the motion to dismiss for the postindictment delay. Those are my reasons. So, we'll go forward with the case. I presume that you brought it before me today in the event that I did rule this way, because the trial is set in a couple of weeks, that there might be a change of plea.

MR. REILLEY: Yes, Judge. Our proposed plea agreement that the government and I have been discussing has one addition to it that was not in it at the time that we had discussed it, and that addition is, if you would accept it, that the plea would go forward in the normal fashion except for the fact that the defendant would enter a conditional plea under Rule II (a) (2), asking the court to reserve his right to appeal the motion to suppress and the motion to dismiss as part of the plea agreement, and that would be subject to your approval, of course.

THE COURT: Is that your understanding, counsel, as well?

MR. IASPARRO: Yes.

THE COURT: And it does say this is under II (a) (2), so that that is a conditional plea.

MR. REILLEY: Yes, sir, it is.

THE COURT: ,And that would -- so that I'm clear, it would be -- the conditional plea, you would be able to appeal both the issue -- all the issues that I have just decided in the motion to dismiss and any issue that was raised in the hearing on the motion to suppress.

MR. REILLEY: Yes, that's correct. Judge.

THE COURT: Is that your understanding?

MR. IASPARRO: It is. Judge .

THE COURT: All right. Then with that -- and this is just a single charge; is that correct?

MR. IASPARRO: There are two charges.

THE COURT: There are two charges. Is he pleading guilty to both charges?

MR. IASPARRO: Yes, Judge.

THE COURT: And it's a conditional plea to both?

MR. IASPARRO: That's correct.

THE COURT: All right. Let me get the indictment so I know what he's pleading guilty to. That's your understanding,by the way?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: You've talked with your lawyer about this?

DEFENDANT SALADINO: Yes.

THE COURT: And you understood what my ruling preliminarily was and then that I would state it on the record?

DEFENDANT SALADINO: Yes, I understand.

THE COURT: All right. Count I charges that back on February 15, 1997, he possessed a certain revolver. Actually, it would be three weapons, firearms; is that correct?

MR. IASPARRO: Yes, Judge.

MR. REILLEY: Yes, sir.

THE COURT: And then Count 2 alleges on that same date that he possessed a machine gun, as defined in the statutes, and I presume that that is the same -- one of the three that's described. Maybe I'm wrong.

MR. REILLEY: It is. Judge.

MR. IASPARRO: It is.

MR. REILLEY: It's number three, the nine millimeter

Luger caliber Cobray machine pistol.

THE COURT: Okay. I understand that. And you understand what you're pleading guilty to?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: Is there anything else before I proceed with the admonitions?

MR. REILLEY: No, sir.

MR. IASPARRO: No, Judge.

THE COURT: All right. Mr. Saladino, I am going to ask you questions so that I can be sure that you understand all your rights, and I'm going to place you under oath. So, you must answer truthfully all my questions. If you don't answer them truthfully, you could be prosecuted for perjury. If you don't, understand any of my questions, just stop me, and I will try to explain it, and if you wish to talk with your lawyer at any time, just stop me, and I'll allow you to do so. Do you understand?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: Raise your right hand.

(Defendant duly sworn.)

THE COURT: Give me your full name.

DEFENDANT SALADINO: Joseph William Saladino.

THE COURT: How old are you?

DEFENDANT SALADINO: 58.

THE COURT: And how far did you go in school?

DEFENDANT SALADINO: GED. I got a diploma, high school.

THE COURT: And you went to Rockford schools?

DEFENDANT SALADINO: Yeah.

THE COURT: You can read and write?

DEFENDANT SALADINO: Yes.

THE COURT: And are you in good physical health?

DEFENDANT SALADINO: Oh, that I can't swear to. I've had heart problems. So, I can't tell you where I'm at right now.

THE COURT: How about are you taking any medications currently?

DEFENDANT SALADINO: Not at the present time, no.

THE COURT: ,So, I guess what I'm trying to get is because of any physical condition, you're not able -- even though you might have a heart condition, you're able to understand what I'm saying right now.

DEFENDANT SALADINO: Oh, yes, your Honor. Yes, your Honor.

THE COURT: And have you ever been under the care of a doctor or in a hospital for any mental condition?

DEFENDANT SALADINO: No.

THE COURT: And have you ever been examined in any other previous criminal court proceeding to determine your competency to stand trial?

DEFENDANT SALADINO: No.

THE COURT: All right. I will find that he certainly answers my questions directly and is competent to proceed. Now, you have employed Mr. Reilley as private counsel. Have you had enough time to talk with him about this charge?

DEFENDANT SALADINO: Yes, I have.

THE COURT: And you've told him everything you know about the case against you?

DEFENDANT SALADINO: Yes, I have.

THE COURT: And you've discussed whether you want to go to trial and present any defense or you want to enter this conditional plea that we've talked about?

DEFENDANT SALADINO: Yes, I have.

THE COURT: And are you satisfied with his advice and efforts as your attorney?

DEFENDANT SALADINO: Yes.

THE COURT: Has any other attorney given you legal advice or represented you in this case? I think Mr. Lund did for awhile.

DEFENDANT SALADINO: Yeah, in the beginning. Yeah.

THE COURT: Any other attorney?

DEFENDANT SALADINO: No.

THE COURT: And is any of his advice, Mr. Lund's advice, contrary to what Mr. Reilley has told you?

DEFENDANT SALADINO: No, your Honor.

THE COURT: I'm going to go over the charges with you,even though we've gone over them a little bit already. Count I charges that on or about February 15, 1997, in Winnebago County, you possessed three particular firearms that are set forth in the indictment and that they had been previously shipped in interstate commerce and that you are a person who had previously been convicted by a court of a crime punishable by imprisonment for a term exceeding one year, which is a felony. Do you understand everything about that charge?

DEFENDANT SALADINO: Yes, I do.

THE COURT: Any questions?

DEFENDANT SALADINO: No, your Honor.

THE COURT: The second charge. Count 2, charges that on the same date you possessed a machine gun, as defined by United States Code, namely, a nine millimeter Luger caliber Cobray fully automatic machine pistol, which was not then identified by a serial number. Do you understand that, as well?

DEFENDANT SALADINO: Yes, I do.

THE COURT: Any questions about that charge?

DEFENDANT SALADINO: No, your Honor.

THE COURT: There is a written plea agreement in this case. I have just been presented it and have not had a chance to read it, but I'm familiar with these. So, I'm going

to ask you questions about it.

First of all, it contains ten pages, 23 paragraphs. It's signed by the Assistant U.S. Attorney, by the U.S. Attorney, by your attorney. I take it that you signed that today?

DEFENDANT SALADINO: Yes, outside.

THE COURT: All right. And prior to signing it today, I take it you had a draft or saw a draft of this or a copy of it?

DEFENDANT SALADINO: Yes, I did.

THE COURT: And had been in the process of negotiatingthis with your lawyer and presumably with the U.S. Attorney, as well?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And as to the final draft then, you have read it?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: You understand it?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And you've consulted as to each and every paragraph with your lawyer?

DEFENDANT SALADINO: Yes, as best I could, yes.

THE COURT: And you understand that this plea agreement is a conditional plea, as I said earlier. You're pleading guilty to everything and giving up some rights, and I will explain later what in particular you are giving up, as far as appellate rights, but at least you are keeping or preserving only certain appellate rights, and that is the motion to suppress and the motion to dismiss. That's the only thing that you can appeal. Do you understand that?

DEFENDANT SALADINO: I understand that.

THE COURT: And is there a waiver of other appeal rights or just a general waiver that he would have as to any other motions that he might have brought and trial

errors, if he had had a trial?

MR. IASPARRO: Just the general waiver. Judge.

THE COURT: Okay. Just the general. All right. Then you also can appeal --if I don't advise you properly today or if I impose a sentence, you can appeal from those, as, well, but I'll explain what else you cannot appeal from. Do you understand that?

DEFENDANT SALADINO: I understand.

THE COURT: Now, the plea agreement in this case is labeled plea agreement, and many people think that, well, because it's labeled a plea agreement, that means that a certain sentence is going to be imposed. That isn't the case here. I will impose a sentence, but there's no agreement as to what that sentence will be. I'll explain to you how I arrive at a sentence, but you understand that there's no agreement as to the sentence.

DEFENDANT SALADINO: I understand it's up to you.

THE COURT: That's right.

DEFENDANT SALADINO: Yeah

THE COURT: And also, does this plea agreement contain all the promises or agreements that have been entered into between you and any government agent?

DEFENDANT SALADINO: Repeat that, please.

THE COURT: Does this plea agreement that you handed me contain all the promises or agreements that the government or a government agent has made to you in connection with your plea of guilty to this case?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And has anybody forced you, coerced you, to enter into this plea agreement?

DEFENDANT SALADINO: No, your Honor.

THE COURT: Now, I'm going to explain the penalties that are set forth in the statute for these two counts, and after that I'll explain to you how I will arrive at a sentence under the Guidelines that are set forth under federal sentencing procedure.

Count I, which is the possession of certain weapons, the three pistols, by a person who has a prior felony conviction, carries the following sentence. It carries a sentence up to ten years is the maximum penalty, and there is a maximum fine of $250,000. Now, is that the same penalty for Count 2?

MR. IASPARRO: Yes, Judge.

THE COURT: I don't see that in the plea agreement, but you're representing to me that that is the same penalty for Count 2.

MR. IASPARRO: It is. Judge.

THE COURT: All right. And you're confident of that.

MR. REILLEY: I'm in agreement. Judge.

THE COURT: All right. Then it is the same penalty, up to ten years' imprisonment and a maximum fine of $250,000. The court could also -- they could run consecutively in certain circumstances. So, the total could be 200 -- or 20 years.

DEFENDANT SALADINO: 200. I can't handle 200.

THE COURT: All right. I understand. Twenty years. And the maximum fine .could be half a million dollars.

DEFENDANT SALADINO: I understand.

THE COURT: Now, I also must sentence you to a special assessment of $100 on each count, which will total $200, which is a penalty that all persons convicted of an offense must pay. Do you understand that?

DEFENDANT SALADINO: Yes, I understand.

THE COURT: Any questions about what the statute provides as to the maximum penalties?

DEFENDANT SALADINO: No, your Honor. I've gone over that with my attorney.

THE COURT: All right. Now, under Federal Sentencing Guidelines, I have to make the determination where within the statute I would sentence you, and it's different than in state court. State court the judge has a range and can pretty much sentence you within that wide range. We have a more narrow range, and that's because for each

federal offense, there are points that are set forth for that offense.

So, both for Count I and Count 2, you go to what is called a base offense level for the unlawful possession of a firearm by a felon, and then as to Count 2, you go to the unlawful possession of a firearm as described as a machine pistol, and there would be points that would be what we call a base offense level for each of those, and they would be in this manual, which has all the criminal offenses. So, I go to the one that's applicable, to your two counts.

Then once I determine the number of points in each base offense level for these two offenses, then if there's any other characteristics of this offense, points could be added. I suppose if you were a felon in possession and it added up to ten weapons, you'd get more points than you'd get for three. Are there extra points here if it's three or more?

MR. IASPARRO: Yes, Judge.

THE COURT: There generally is, but I don't know what Guidelines are going to be used. That is, are the Guidelines today, the 2 002--

MR. IASPARRO: No, Judge.

THE COURT: (Continuing) -- or the Guidelines back in —

MR. REILLEY: '97.

THE COURT: '97.

MR. IASPARRO: Right .

THE COURT: That would be more favorable to the defendant.

MR. REILLEY: Paragraph C on Page 3 deals with the question of how many firearms.

THE COURT: And does that add a point or two?

MR. IASPARRO: That adds one level. Judge.

THE COURT: All right. That's what I'm talking about. When you look at the offense, there may be characteristics of the offense, such as .that, which, as I say, if you had ten or fifteen weapons, that would be added points, and there may be other characteristics. If you had threatened

somebody with the weapon or used the weapon in some way, maybe there would be additional points for that.

But that's what I'm telling you -- that's what I'm trying to describe to you are how we get points for the offense level. And I don't know anything about your case yet. So, that's why I can't forecast what the points will be.

Once I determine what those points are -- and you get good points for pleading guilty, and you want to try to get as few points as possible. So, pleading guilty helps you. Once I determine all the points and the offense level, then I look at your criminal history of convictions, and certain convictions are counted, certain are not. Certain criminal conduct is counted, and certain is not. But I will have to determine points there, and then you're placed in a criminal history category.

Once I determine the criminal history category and I determine the offense level, then I just go to the back page of this book, and that will tell me that a person who has such and such an offense level and is in a criminal history category, whatever that may be, then I go to that chart, and it has a range, and that range is set forth there, and I must sentence you within that range. I can't be lower or higher, unless there's a factor in your case that's not contained in the Guidelines, and most factors are in the Guidelines, but there could be a factor not in the Guidelines. Then I could depart downward if it was in your favor or upward if it was not in your favor.

Now, the lawyers in the plea agreement try to calculate what they believe the Guidelines will be, and sometimes they agree on all of them. Sometimes they don't agree. Whether they agree or don't agree, I have to independently look at the Guidelines and the law and the facts. So, I can calculate them differently, and you're stuck with what I calculate. Of course, it could be in your favor if I calculate them differently. But all I'm saying is that I'm the one that will calculate them, and you understand that.

DEFENDANT SALADINO: Yes, I do.

THE COURT: Now, in the plea agreement, counsel, I take it that you have tried to make a calculation. Can you tell me what that is?

MR. IASPARRO: Yes, Judge. The Sentencing Guideline range is 27 to 33 months of imprisonment.

THE COURT: And that's what both of you believe.

MR. REILLEY: That's preliminary. Yes, Judge, we agree with that.

THE COURT: Okay. And is there any basis for anupward or downward departure?

MR. IASPARRO,: No, Judge.

THE COURT: Is that right?

MR. REILLEY: So far.

THE COURT: All right. Well, you're --

MR. REILLEY: Again, without seeing the presentencereport. Judge, I'm not in a position to comment. There's nothing on paper wherein there's an agreement for an upward or downward departure.

THE COURT: All right. But in some cases the defendant will give up his right to file any downward departure

motion as a part of the plea agreement, and if that's the case, then you can't raise an issue before me at sentencing, if you've agreed not to.

On the other hand, I can always on my own, if I felt that a Guideline was applicable or there was a basis for a downward or upward departure, I could do it on my own, but you can't raise it.

MR. REILLEY: Yes, sir. Judge, I think my position is that I always -- in my practice, I prepare a sentencing memorandum for the court after I receive the presentence report and point out things to the court for that purpose, just to help the court along in terms of what we feel the facts may show. Not that you wouldn't already know it, but maybe from the perspective of the defendant.

THE COURT: Well, you're entitled to a defendant's version of the offence.

MR. REILLEY: Yes, sir.

THE COURT: What I'm trying to specify is that if —maybe Mr. Iasparro will direct what his understanding

is. If something comes along, is he precluded under the plea

agreement, meaning the defendant precluded, from filing a motion for a downward departure?

MR. IASPARRO: Under the plea agreement he is. Judge. Paragraph 17 on Page 9, the parties agree that there is no aggravating or mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Guidelines.

THE COURT: So, the government is also agreeing as to an upward departure --

MR. REILLEY: That's correct. Judge.

THE COURT: (Continuing) -- that they can't come in --

MR. REILLEY: I understand the language.

THE COURT: (Continuing) -- and try to ask for an upward. I'm the only one that can do it both ways.

MR. REILLEY: Yes, sir. I understand that.

THE COURT: Do you understand that?

MR. REILLEY: Yes, sir, totally.

THE COURT: Do you understand that?

DEFENDANT SALADINO: Yes. Yes, your Honor.

THE COURT: You can make a—I'll accept the defendant's version, ,but you can't argue for a downward departure. I'll accept whatever the prosecutor tells to the probation officer, but he can't argue for an upward departure.

MR. REILLEY: We can only point out the facts to the court, and the court will make the decision.

THE COURT: That's right.

MR. REILLEY: And that's what we're going to do.

THE COURT: All right.

MR. IASPARRO: Judge, if I could interrupt you at this point. I don't believe you've admonished the defendant that he will be placed on supervised release after his period of imprisonment.

THE COURT: That's right. I should have. One other penalty that must be imposed is a period of supervised release following any term of imprisonment, and supervised release is like probation. You report to the probation officer, who is under my direction, and if you violate any of the terms of that supervised release, then I can revoke it, and you can be resentenced to imprisonment. And that the period of time that I can set for your supervised release -- is it not less than two, no more than three?

MR. IASPARRO: That's correct. Judge.

THE COURT: I must impose it. It would be at least two, but not more than three years. Do you understand that?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: All right. Do you want to give me a factual basis for the plea?

MR. IASPARRO: Yes, Judge. In general, as charged in Counts I and 2 of the indictment, defendant admits that on

February 15th, 1997, at Rockford, in the Northern District of Illinois, Western Division, he knowingly possessed firearms, namely, one .357 Magnum Colt Trooper MKIII revolver, serial number J93643; one .380 auto caliber Colt government model semiautomatic pistol, serial number RC82068; and one nine millimeter Luger caliber Cobray machine pistol without serial number.

Defendant further admits that the Cobray nine millimeter machine pistol that he possessed was a machine gunas defined in Title 26, United States Code, Section 5845(b). Defendant further admits that his possession of these firearms was in and affected commerce and that these firearms were manufactured outside the state of Illinois and had been transported to Illinois in interstate commerce. Defendant also admits that prior to February 15th, 1997, he had been convicted of a crime punishable by imprisonment for a term exceeding one year.

Specifically, defendant admits that in the early morning hours of February 15th, 1997, he was driving his car westbound on East State Street in Rockford, Illinois, when he was pulled over for a speeding violation. At the time of the traffic stop, defendant was alone in his car and possessed the following. A loaded .380 caliber handgun, an

unloaded .357 Magnum handgun, an unloaded nine millimeter fully automatic machine pistol with no serial number, and in excess of 400 rounds of ammunition. In addition, defendant had two books on how to make silencers, a book on machine lathes, a billy club, two Slim Jims, two bolt cutters, a tree-trimming saw, one butcher knife, a pipe wrench, a stocking cap, and two face masks. Defendant had all of these items in the trunk of his car.

THE COURT: Those are the facts that the government said it would prove if it went to trial and you have agreed to in the plea agreement. Are they correct?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And you did, in fact, commit the offenses in Count I and Count 2 as just stated?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: I'm going to advise you now of your rights as to trial. First of all, you have retained counsel to represent you in this case. He's experienced, able counsel, and he's here to represent you whether you plead guilty or go to trial. If you decide to go to trial and could not afford counsel to represent you, I would appoint an attorney to represent you. Do you understand that?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: In addition, you have previously pled not guilty. Do you understand you could persist and continue to plead not guilty and go to trial?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: Here are your trial rights. First of all, you'd be present at the entire trial. You'd be able to confront and cross-examine any witnesses who testify against you. You'd be able to bring in any witnesses by subpoena to testify in your case. And you can testify, but nobody, including me, can force you to testify. You have a Fifth Amendment right not to take the witness stand. Do you understand those rights?

DEFENDANT SALADINO: Yes, I do.

THE COURT: You also are presumed to be innocent of both charges, and the government has the burden to prove

you guilty of both charges beyond a reasonable doubt. You don't have any burden. You don't have to offer any evidence. You can rely on your presumption of innocence. Do you understand that?

DEFENDANT SALADINO: Yes, I do.

THE COURT: There are two types of trial. One is a bench trial, where I would hear the evidence, and after hearing the evidence, I would determine whether you're guilty or not guilty. Or the other type of trial is a jury trial, where we bring in jurors. They hear the evidence. They determine whether you're guilty or not guilty. If you plead guilty, you understand there is no trial. There's just a sentencing hearing.

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And if you wanted a trial before me, you and your lawyer, the government, and I would all have to agree to that. Do you understand what a bench trial is?

DEFENDANT SALADINO: Yes, I do.

THE COURT: A jury trial, as I've said, is one where we bring in jurors from this district and division. I question them to make sure they would be fair and impartial to both you and the government. If any juror would not be fair, I would excuse that juror for cause. Once we have -- and you and your lawyer have a right to excuse up to ten jurors for any reason whatsoever, except based on the juror's race or based on the juror's gender.

Once we have twelve jurors who are fair and impartial, then they listen to the evidence. At the end of the case, they go back and deliberate. The only way you can be found guilty is if all twelve vote that you're guilty and return that guilty verdict into court. If all twelve vote that you're not guilty, then you can't be tried again for the offense. If the jurors split, some for guilty, some for not guilty, then I could declare a mistrial, and you could be tried over again. Do you understand what a jury trial is?

DEFENDANT SALADINO: Yes, I do.

THE COURT: Finally, let me explain to you your appeal rights. We've already discussed that you've preserved your right by this conditional plea to appeal those matters that

I've already said to you, the motion to suppress and the motion to dismiss. You also can appeal any sentencing error that I may make or any error that I make today or the magistrate judge has made.

But what you do give up when you plead guilty is that if there were any other motions that could have been filed, you're giving those up, and you cannot appeal those. In addition, because there's no trial, then you're giving up your right to appeal any errors that might have occurred at the trial. Do you understand your appeal rights?

DEFENDANT SALADINO: Yes, I do.

THE COURT: All right. You said you understand all your rights. Is it your desire to give those up and to plead guilty?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: Nobody is forcing you to plead guilty?

DEFENDANT SALADINO: No, your Honor.

THE COURT: And all the agreements are in the plea agreement?

DEFENDANT SALADINO: Yes, they are.

THE COURT: All right. Then as to Count I, what is your plea? Is it guilty or not guilty?

DEFENDANT SALADINO: Guilty.

THE COURT: And as to Count 2, what is your plea? Is it guilty or not guilty?

DEFENDANT SALADINO: Guilty.

THE COURT: Any reason why I shouldn't accept those at this time, Mr. Reilley?

MR. REILLEY: No, sir.

THE COURT: Any reason, counsel?

MR. IASPARRO: No, Judge.

THE COURT: All right. Since you acknowledge that you're, in fact, guilty as charged in Counts I and 2 and have had the assistance of counsel, I will accept the plea of guilty. I will find you have been advised of your rights,

understand them and the consequences and the possible punishment, and persist in pleading guilty. I'll further find there's a factual basis for this plea of guilty and that the plea of guilty was made voluntarily and without any threats or promises, and I'll enter judgment on the guilty plea to both counts, and I will accept the conditional plea of guilty under II (a) (2).

The next thing that will happen is that you will be talked to by a probation officer to get details about this offense and about your background. You must answer those questions truthfully. If you don't, you could be prosecuted for perjury, and you could -- well, you could at least get obstruction of justice, and for obstruction of justice, you would get additional points on your Guidelines, and you'd lose the good points that you get for pleading guilty. So, make sure you say everything truthfully. In addition to that, you should have your lawyer present when you're talked to by the probation officer. That's permissible, and you should be present.

You're on bond. He's entitled to continue on bond, is he not, counsel?

MR. IASPARRO: He is. Judge.

THE COURT: And don't commit any offense while you're out on bond. Obviously, that would hurt you.

I'll set a sentencing date, and we shall proceed on that date with sentencing. If you feel that there's a basis for me after he is sentenced to continue him on bond, then you must prepare a written motion to that effect.

MR. REILLEY: Thank you for saying that. Judge, because that will be my intent to do that.

THE COURT: And have that filed prior to the sentencing.

MR. REILLEY: I sure will.

THE COURT: I mean, some of these cases where we get a conditional plea, they do it, depending upon the factors, and I'll have to consider that. I'm not saying it will be granted. I'm not saying it will be denied. But I want to be prepared to handle that at the time of sentencing.

MR. REILLEY: We shall do. Thank you.

THE COURT: When are we looking at for sentencing?

THE CLERK: January 21 is the earliest.

THE COURT: Well, we're going to do it—I've already got at least four that week. I'm going to catch this one --I'm going on vacation. I'll get this one when I get back. You're not in any hurry, are you?

MR. REILLEY: No, sir.

THE COURT: The government has no reason to --

MR. IASPARRO: No, Judge.

THE COURT: Anyway, I will be available -- oh, what about February 5th?

MR. IASPARRO: That would be fine

MR. REILLEY: That's fine.

THE COURT: Is that all right?

MR. REILLEY: Yes, sir, it is.

THE COURT: Do you want it at 1:30? Is that better for you? Or 10:00 o'clock.

DEFENDANT SALADINO: Well, the later in the day the better for me.

THE COURT: All right.

MR. REILLEY: I guess 1:30, Judge.

THE COURT: 1:30. And my practice here is that if you're going to make any objections, either the government or you, to the Guideline calculations or any of the facts that are set, you must file a written objection, and that will be stated in the back of the order that I'm entering now as to your timeline for that.

MR. REILLEY: Yes, sir, that's fine.

THE COURT: So, I always want everything in writing so that then if the government has an objection, then you can respond to it in writing. So, that's the way it will go. And I want to handle everything so we don't have to have continuances. You don't run all the way out here and I don't prepare for something and then not be able to

proceed. All right then. We've set it for that date. Is there anything else at this time?

MR. IASPARRO: No, Judge.

MR. REILLEY: No, sir. Thank you.

THE COURT: All right. That's all.

MR. REILLEY: Thank you. Judge.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	) Docket No. 03 CR 50016
Plaintiff,	) Rockford, Illinois
v.	) Wednesday
	) March 25, 2004
JOSEPH SALADINO,	)
Defendant.	) 10:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES

For the Government:	HON. PATRICK J. FITZGERALD United States Attorney (308 West State Street, Suite 300, Rockford, IL 61101) by MR. MICHAEL F. IASPARRO Assistant U.S. Attorney
For the Defendant:	MR. JAMES W. REILLEY (2015 S. Arlington Heights Road, Arlington Heights, IL 60005)
Court Reporter:	Mary T. Lindbloom 211 South Court Street Rockford, Illinois 61101 (815) 987-4486

THE CLERK: 03 CR 50016-1, U.S.A. v. Saladino.

MR. IASPARRO: Good afternoon, your Honor. Michael Iasparro on behalf of the United States.

THE COURT: Good afternoon. Step forward.

MR. REILLEY: Good afternoon. Judge. James Reilley on behalf of Mr. Saladino, who is now present.

THE COURT: All right. Good afternoon. This matter is set for sentencing. Are you ready to proceed?

MR. IASPARRO: Yes, Judge.

MR. REILLEY: Yes, Judge, we are.

THE COURT: All right. Let me tell you what I have, make sure we all have the same thing. I have the presentence investigation report. , I have a supplemental report, which is dated March 23rd. I have several letters in support of the defendant, and I've got the defendant's sentencing memorandum and request to remain free on bond pending appeal. I don't have any response to that, do I?

MR. IASPARRO: No, Judge.

THE COURT: All right. Is there any other information or documents that I should have?

MR. REILLEY: No, Judge. I believe you have it all.

THE COURT: All right. Then you're ready to proceed?

MR. IASPARRO: Yes, Judge.

MR. REILLEY: Yes, sir.

THE COURT: Mr. Saladino, I have a couple of questions of you. Have you had a chance to read the presentence investigation report?

DEFENDANT SALADINO: Yes, I have, your Honor.

THE COURT: You understand it?

DEFENDANT SALADINO: Yes.

THE COURT: And you've gone over it with your lawyer?

DEFENDANT SALADINO: Yes, I have.

THE COURT: And you understand that he has not made any objections to the facts or the guideline calculations, except that he has asked for a downward departure, and I'll get to that in a minute, but you understand that that's how he is proceeding.

DEFENDANT SALADINO: Yes, I do.

THE COURT: And that's the way you wish to proceed?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: All right. Then first let's take up the defendant's sentencing memorandum. In the plea agreement, as you set forth in your memorandum, you did give up -- you and the defendant gave up the right to seek a departure outside the guideline range. You are suggesting, I guess because of his triple bypass, that that is a changed situation.

Mr. Iasparro, do you want to speak to, first of all, him making that motion in the first place?

MR. IASPARRO: Judge, I don't believe the motion is appropriate. Pursuant to the agreement, both parties negotiated that away, and I believe that the defendant should be bound by the agreement and not be entitled to make the motion at all.

THE COURT: Do you want to respond?

MR. REILLEY: Yes, sir, I do. Judge.

THE COURT: Go ahead.

MR. REILLEY: Judge, I fully agree with the government that we negotiated away that. In fact, I recall specifically the court saying to me at the plea in November that "You understand Mr. Reilley, that there cannot be any downward departure motions by the defendant." You did say that to me, and I acknowledge that. That's true. However, Judge, as we stood here, all of us, including the Sentencing Commission, who weren't here, we didn't know that Mr. Saladino was about to have some serious surgery and which he did have. He's still not in great condition. He's undergoing the therapy that is required after that surgery. So, I felt it necessary and appropriate and incumbent upon me to point that out to the court.

Obviously, it's kind of a two-sided motion. I can't file it myself, but I can at least point out to the court, which I'm doing, that there was something that happened after the plea that none of us were aware of, including the court, the defendant, myself, Mr. lasparro. Nobody knew. I think it's something the court should take into consideration. It's totally your discretion, and I guess that's really what I'm doing. I'm not making per se a downward departure motion under 5K2, but I'm pointing out to the court what I believe is necessary, and I think not only did I do it, but probation did,too, in their recent supplemental filing, indicating to you the documents that I already sent to the court.

So, although I agree with the government that we did bargain away that ability to ask for a downward departure, I feel it's incumbent upon me to point it out to the court, and it's certainly up to you, and I have nothing else to say about it.

THE COURT: Well, I, in every case, read the presentence report to see whether I differ from the lawyers or I differ from the probation officer who has prepared the report. Whether it's the guidelines or whether it's a departure, I always look for that to see on my own whether there is a basis for a different calculation or a basis for a departure. In this case, somehow, either by oral conversation with the probation officer, I became aware of the fact that he was having surgery before I got your request, and I then got all the documents at a later point in time. So, I would have looked at it, anyway.

The problem is that just having a medical condition -- and I'm talking about under the case law and under the Sentencing Guidelines as interpreted ~- he would have to have a medical problem that is not treatable in the Bureau of Prisons, and from what I see here, there's no evidence that it is not treatable in the Bureau of Prisons. I'm not saying that's the ideal place for the treatment, but under the case law it is not a basis for a downward departure. I may consider it in where I'm going to sentence him in the sentencing range, but it would not be an appropriate basis for a downward departure. Therefore, I, under the facts, don't see any basis for it.

MR. REILLEY: Judge, I understand, and, again, I just

feel it was my obligation to bring it to your attention; although, I realize you probably knew it because of the PSI.

THE COURT: There are several things that I will bring to both sides' attention, and when we get to that stage where I will be sentencing him and considering your motion, I'll bring those up at that time~

MR. REILLEY: Okay.

THE COURT: But we'll proceed then as follows. I will find that I will adopt the facts in the presentence report and the addendum and adopt the guideline calculations using the 1995 guideline manual, where I have grouped Counts I and 2 that he has pled guilty to. The base offense level then under 2K2.1(a) (4) (B) is a 20-level enhancement. There was a possession of multiple firearms, 2K2. (b) (1) (A), for a one-level enhancement. The offense level then is 21. I'll give him three points' decrease for acceptance of responsibility under 3EI.I

And so, his total offense level is 18. He's in a criminal history category of one. Therefore, the sentencing range is 27 to 33 months. And, as I've previously said, there's no basis that I could find for a downward departure. He does have medical problems, and I want you to elaborate on what his course of treatment is going to be. The reports that I saw were what led up to the surgery and then what the surgery was. It was a triple bypass, as I understand it.

MR. REILLEY: Yes, sir, it was.

THE COURT: And then he had some problem afterwards, but I'm more interested in at some point, when it's your opportunity to speak, to give me more, and he can, as well. But the way we will proceed then is first I'll have the government make a recommendation of the total sentence, and you can make a recommendation, and t~enl'll let the defendant say anything in his own behalf.

MR. REILLEY: Okay.

THE COURT: Go ahead, Mr. lasparro.

MR. IASPARRO: Judge, just briefly, I would like to point out one thing. In the plea agreement the defendant admitted to not only possessing three firearms, one of

which was a machine gun, and in excess of 400 rounds of ammunition, but also possessing a book on how to make silencers -- actually, two books on how to make silencers, a book on machine lathes, a billy club, two slim jims, two bolt cutters, a tree trimming saw, one butcher knife, a pipe wrench, a stocking cap, and two face masks.

During the presentence interview, the probation officer in the presentence report reports that the defendant indicated he had been storing those guns at his house for a period of time for a friend and that he had recently at the time of his arrest decided to return those guns to his friend. It seems contradictory. Judge, to what else was found in that trunk. Specifically, the ski masks, the 400 rounds of ammunition. It doesn't seem like a case where there was a simple possession of a revolver, for example. There was a machine gun involved here, in excess of 400 rounds of ammunition, and tools that indicated that the defendant was possibly up to something other than just returning those firearms to a friend.

That having been said. Judge, pursuant to the plea agreement, the government recommends a sentence within the applicable guideline range.

THE COURT: Now, this case arose back in 1997, and the government since that period of time has not uncovered any other evidence as to what was in the trunk and the potential use or any past use of it. You don't know anything more now than you did then.

MR. IASPARRO: That's correct. Judge. That's correct.

THE COURT: All right. Counsel.

MR. REILLEY: Yes, sir. Judge, I'd like to start out by first of all indicating to the court that Mr. Saladino is here, but also his family is here, as you can see behind us.

THE COURT: All right.

MR. REILLEY: There's a comment here, and with all due respect to the government. Judge, as you correctly stated, this case started six years ago. He was prosecuted in Winnebago County. He entered a plea of guilty with his counsel at that time for the same identical offense, including a DUI, and was placed on two years' felony probation

for the guns. He successfully completed the probation. There were no problems. That probation was over.

The government, as I indicated on the motions that were previously filed, was aware of this case. Maybe perhaps not counsel present for the government, but other members of his staff and office were .aware of it. They chose at that time not to prosecute, and we did bring that forward to the court in motions. But it appears that although they knew about it then, chose not to prosecute him and perhaps take over the state case. If you look on Page 3, line 85, Mr. lasparro reported that at that time the United States Attorney's Office did not believe the punishment for Mr. Saladino's criminal conduct in that case was satisfactory.

So, if there's a reason we're here, it's not Mr. lasparro's decision, but their office felt that the prosecution of Mr. Saladino back then in '97, '98 in the state court and the punishment he received, after a thorough plea of guilty and a PSI and etc., as we're doing now, was done, the judge in that case chose to give him, because of his lack of a background, his only prior being 40 some years ago, to give him probation. Somehow the government waited almost to the day, five years to the point that the statute was about to run, as you know from my motions, and through their decision decided to charge him federally with the same offense he was charged with in the state court.

THE COURT: There is some indication that the government had another investigation in which he either was a witness or maybe a potential defendant. What that is I have no knowledge of, but it appears to me that at least from the presentence report that is what my probation officer stated. That was in there, was it not?

MR. REILLEY: That's true. Judge, but if you'll look at it, you'll notice that when the indictment was returned in the Northern District --

THE COURT: They waited a year.

MR. REILLEY: (Continuing) -- they waited a year, and there was a thing I believe I saw that Judge Shadur, who did transfer the case to you, had withheld or held the indictment prior to letting it be released publicly before he

was arrested, but still it was still five years almost to the day from the day of the offense.

THE COURT: Mr. Iasparro, do you have anything you want to say in relation to that? Because I do consider that as something that's very unusual to the detriment of a defendant. You have every right not to indict somebody until the limitations are over with, but it is unusual here, and I've made the point not on this type of case, but on other cases that I want people who are under investigation and know they're under investigation that they ought to be prosecuted as soon as possible.

MR. IASPARRO: Judge, if I could put it into context a little bit. With all due respect to Mr. Reilley, I think what's reported by the probation officer was sort of taken out of context here in court. There was a telephonic interview between Ms. Brown and myself during which I explained that during the course of a pending investigation, which I can't get into at this point, my supervisors in the U.S. Attorney's Office in the Eastern Division made the determination that the sentence received by the defendant back in 1998 for this offense on the state level was inappropriate. The punishment did not fit the crime. They decided, based upon their independent judgment, to indict the defendant, and the indictment was returned correctly almost five years to the day after the offense was committed. But it was in the context of an investigation that was ongoing a couple of years ago that it was discovered by members of the Eastern Division that the defendant had been convicted and not been punished appropriately in the Northern District of Illinois U.S. Attorney's Office's discretion. It was not a decision that was made at the time back in 1998 that that was an appropriate punishment or not an appropriate punishment.

THE COURT: But certainly your office here was aware of that, that he was prosecuted back in 1997 or 1998.

MR. IASPARRO: They certainly would have been. Judge.

THE COURT: And, in fact, it came out that Mr. Syfert or somebody from the office said that they didn't intend to prosecute him, and eventually this winds up in an Eastern Division case, which is unusual to me. Go ahead.

MR. REILLEY: Yes, Judge. To follow up on your com-

ments, for whatever reasons, which are unknown to me, the indictment came out of the Eastern Division. It laid in the grass for awhile until, about a year afterwards. So, now we're into six years after the event, at which point Mr. Saladino is finally arrested here, and here we are. It went to Judge Shadur first, and we're back here because this is where it properly belongs, anyhow.

The indictment did come out of there, but as the evidence came out in the motion to dismiss, there's no question, Judge, that this office here, the U.S. Attorney's Office in Rockford, knew about it. In fact, there was conversations with the State's Attorney and the U.S. Attorney's Office in which there was an indication there would not be a prosecution. So, as far as knowledge, there's no question. As far as discretion as to prosecution, that's what they did then back in '97, '98, and then all of a sudden in '04 here we are. So, that's my comment on that, Judge.

Again, I don't dispute the guideline computations. I understand the situation that the court has indicated about his condition. The only thing I can say. Judge, without having Joe help me, is in looking at the medical reports, which is all I have, is that since then he has had, by my miniscule knowledge of medical language, although my daughter is a nurse, is that a cardiac infarctus is a heart attack, and that seems to be what happened subsequent to the surgery.

According to the last report that I have in February of this year, he is starting cardiac rehabilitation, and he's on various of the medications that you've read. I think the best person to tell you what he's doing is him himself. So, I would ask, before I finish my comments -- and I have more -~ if you would like to hear what Mr. Saladino --

THE COURT: I would like to hear what you have to say, as far as what your progress is and what you're doing and what the doctor says.

DEFENDANT SALADINO: Well, I've been going to rehab, which is exercise classes. I'm going to that three times a week. I have an appointment with the doctor next Friday, and I have one scheduled ù I have something scheduled to do with my leg. I have a problem with this leg, as far as circulation goes. And that's all scheduled, you

know. Like next Friday, I got one next Friday as far as my breathing goes, and then I still have to make this one for my leg, and the 30th of the month I have them with my heart doctor. So, you know, that's just in the future. As far as this exercise goes, I guess that's up to them how long, you know, you want to keep it up.

THE COURT: You had this operation what? The 20th or thereabouts?

DEFENDANT SALADINO: January 20th, yes.

THE COURT: All right. Go ahead.

MR. REILLEY: Judge, in keeping that in mind, I guess my point to the court is, again, with all due respect to counsel, there's a big issue in my mind, at least, as to how -- in my 35 years doing t,his, I must admit to you honestly I have never seen -- never seen -- a state court prosecution result in a federal court prosecution. I know it happens. It's infrequent. But this is unusual to me, which is why I brought those motions, the motion to suppress, which obviously had to be filed because of the nature of the arrest and the DUI and the search of the trunk and the inventory searches and all the things we went through, and, more importantly, the motion to dismiss based upon the case aw we brought up at that time. So, here we are again. Same case. The man's been punished already. Felony conviction. We're before the court. We have the federal guidelines to deal with. And so be it. I understand that. But based upon that. Judge, I'm asking the court, based upon all of the events, the motions filed, the court may feel have some merit to them or at least are meritorious of an appeal, the defendant's physical condition, the fact that he was prosecuted twice, the fact that they waited five years -- six years to bring it to court again, the nature of the guidelines being 27 to 33 months, and the court being bound by that, if the court feels it's inappropriate to depart further downward, I would ask the court to give him the low end of the guidelines based on everything.

He's 58 years old. His prior conviction. Judge, was back when he was a kid. He's born and raised in Rockford. He's never violated one condition of bond since he's been out. He's always been here. In .fact, the Probation Office indicates to me in her report tendered to me just a little

while ago that should the court sentence the defendant to imprisonment, they're recommending voluntary surrender. I, of course, agree with that, but I would also ask the court to consider the fact in my motion that I do intend, with Mr. Saladino's permission, to file a notice of appeal. I would ask the court to consider leaving him out on bond under all those circumstances pending the appeal, which I personally will handle for him. That's all I have, Judge.

THE COURT: Thank you. Do you wish to say anythingelse in your own behalf?

DEFENDANT SALADINO: No, your Honor. Not really, no.

THE COURT: All right. I'll take up the matter of self-reporting or -- yes, self-reporting to the detention facility in a few minutes, along with the bond issue. But let me explain my reasons for the sentence and make my comments, and then I'll sentence you, and then I'll take up the other matters that I just referred to.

This is an unusual case, and the government has every right to indict someone for the same conduct; although, they generally -- it's really the exception that they do so, and, if they do so, it's normally done, in the few cases I've had it, soon after the offense was prosecuted in state court. I don't like both jurisdictions taking a shot at any defendant. I think it's just fair to take, one court and prosecute. And then for the United States Government, with all its power, not only to take a second shot at him, but to do it five years later, it seems to me to be not in the best interests of the United States, and it gives the appearance of overreaching.

Now, the government had some reason for doing this beyond, in my opinion, just the fact that they didn't like the probation that he got because if that was the only factor, the United States Attorney here, the supervising attorney, would have brought the prosecution. But somehow this came to the attention of somebody while some other investigation, the facts of which I know nothing about and have not been disclosed to me, they resurrect this case, and then they sit on the indictment for a year.

All of that being said, it does not give the appearance of the proper exercise of the authority of the government,

and, therefore, because of that, I am giving him the low end of the guideline range. On Counts I and 2 that he's pled guilty to, I'm giving him 27 months in the Bureau of Prisons. I'm also going to recommend that they place him in a minimum security institution and, if he needs a medical facility, that they place him in a medical facility at Rochester.

I further will sentence him to two years of supervised release under the standard written conditions. I will not impose any fine because of his inability to work, and he has no assets. And he also paid $4300 in state court as punishment for this offense back in 1997 or 1998. I will order that he pay the special assessment of $200.

This was a conditional plea. I take it that what the conditional plea was was related to the motion to suppress evidence; is that right?

MR. REILLEY: And the motion to dismiss the indictment.

THE COURT: Okay.

MR. REILLEY: Yes, sir. Both.

THE COURT: Okay. I'm going to advise you that if you wish to appeal, you must file a notice of appeal within ten days of this date. If you're indigent, that is, you can't afford counsel, then I would appoint counsel for you. Do you understand that?

DEFENDANT SALADINO: Yes, your Honor.

THE COURT: And you understand the sentence.

MR. REILLEY: Yes, sir.

THE COURT: Is there any question about the sentence so far?

MR. REILLEY: None, Judge.

THE COURT: All right. Now, as to the self-designation and the motion on bond, I have looked at that, and, again, this is an unusual circumstance. First of all, he just underwent triple bypass within the last 45 days or thereabouts. Secondly, because of that, I don't see the urgency to have him report right away. Usually I set a reporting date from four to six to eight weeks away, but on occasion

I have set it out in the distance when I feel that there's a reason for it. I've had husband and wife indicted and convicted, and they've got young children, so I've delayed it as long as a year.

In this circumstance, because of his medical condition, because the government waited six years before he was actually served with the indictment, I don't think the government is in any hurry in this case. And, finally, there may be a point on appeal as it relates to the issue about the second indictment, after being told that there wouldn't be one. I don't think the search and seizure issue is going anywhere, frankly, but you can always appeal it. I don't know if the other issue is, but to me, it's the closest issue that some appellate court could take a look at it and say the government has gone too far.

With that then, I'm probably going to go out in distance in terms of his report date, say, nine or ten months, which then will give also the opportunity to file an appeal and to speedily process it. So, that would be tied in with the bond motion.

MR. IASPARRO: Judge, if I could address that. Maybe this is more of a question than anything, but I want to make sure what the court's ruling is. Is the court finding by the clear and convincing standard that the conditions of release pending appeal have been met, or are you just setting out a reporting date?

THE COURT: I'm setting out a reporting date.

MR. IASPARRO: Okay.

THE COURT: A date that I'll designate in the future.

MR. IASPARRO: All right. I just wanted to make that clear.

THE COURT: Rpnaiise I wanted to tie it in with the appeal --

MR. IASPARRO: I understand.

THE COURT: (Continuing) -- in the sense -- I guess what I'm saying is there's a reporting date, but that it may meet the extraordinary circumstances of a release on bond. I'm not going to make that ruling at this time.

MR. REILLEY: Judge, I would indicate, just so the record is clear, I have the notice of appeal prepared, and it will be filed today. I intend to follow up, as I indicated in my motion, and I will.

MR. IASPARRO: And just for the record. Judge, I know the court is aware of the standard, but for purposes of the record, it is a clear and convincing standard to remain free on bond pending appeal. First, that the defendant is not likely to flee or pose a danger to the safety of any other person or the community and that the appeal is not for the purpose of delay, which I'm not suggesting it is, and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. I just wanted to make that a part of the record. Judge. That's 18 United States Code Section 3143 (b).

THE COURT: Yes. I would probably make a finding that they would meet -- you have not put on any evidence that he's a flight risk or that he's a danger to the community.

MR. IASPARRO: No, Judge.

THE COURT: It would be the issue of whether there's a significant issue on appeal.

MR. IASPARRO: That's likely to result in a reversal,

new trial, or those other.

THE COURT: Yes. And I'm not going to rule on that at this time because it will be moot because I'm going to require that -- I'm going to set the reporting date because of several factors. One, his health, and we'll know more in a number of months, and then we'll know -- it will give the Bureau of Prisons a better idea as to whether they're going to put him in a medical facility or whether they're going to put him in just the regular facility.

And I think that because he's got some ongoing problems that I have to put that out in the distance, and that, coupled with the fact that there may be an issue on an appeal. I'm setting the designation of the place of detention off for ten months from now. And that will give you -- and so. I'm saying to you, Mr. Reilley, that it behooves you to file your notice of appeal --

MR. REILLEY: It will be. Judge.

THE COURT: (Continuing) ù and your jurisdictional statement and everything else and get the case moving so that you'll probably get the case before the court in five, four months, and then you'll have a decision. This is a simple case to decide the issues, and you'll have a decision in ten months.

MR. REILLEY: Yes, sir, I will do that. Judge, ten months from now is November. I only ask that we don't do what we did last year and make me come here in my orange coat and my hunting outfit. So, keep it out of Thanksgiving.

THE COURT: Well, it's hard for me to say when -- I don't even know when Thanksgiving is.

THE CLERK: Ten months is January.

THE COURT: I beg your pardon?

THE CLERK: It's January. Ten months.

MR. REILLEY: January is -- oh, that's right. It is. This is March.

THE COURT: I don't know what is ten months from now.

MR. REILLEY: That's January.

THE CLERK: January.

THE COURT: Well, make it January the 15th. What day of the --

THE CLERK: That's a saturday.

THE COURT: Well, make it the --

MR. REILLEY: 17th?

THE COURT: All right. The 17th. But he's not reporting to me, in the sense that he's reporting to wherever you're designated. And it would be -- what you should do is -- I'm not sure whether they will wait for awhile to designate depending upon his medical condition. You should talk to Mr. Cunneen from the Bureau of Prisons, who's in Chicago, and he'll tell you what information he's going to need.

MR. REILLEY: Okay. And, Judge, depending on what the Seventh Circuit does, I will, of course, file any motions that are appropriate way before then.

THE COURT: That's right. As far as your motion for release on appeal bond, because of my ruling are you withdrawing that?

MR. REILLEY: At this time, yes.

THE CLERK: January 17th is a holiday.

THE COURT: 18th then.

MR. REILLEY: What time on the 17th, if we do come to court? No. That's a surrender date.

THE COURT: No. The 18th is now going to be the surrender date because the other is a holiday.

MR. REILLEY: Oh, okay.

THE COURT: Now, would the probation officer step forward?

MR. IASPARRO: Judge, before you address the probation officer, can you just show for the record that that reportingdate is over the government's objection?

THE COURT: It will.

MR. IASPARRO: Thank you. Judge.

THE COURT: He will be under -- I want him under supervision from now until that date. Who does the supervision? Is that pretrial services or —

MS. BROWN: That's my understanding, your Honor.

THE COURT: All right. I want you to inform her that he will be under the same conditions. He's got a bond?

MR. REILLEY: Yes, Judge.

THE COURT: Is it a recog?

MR. REILLEY: Yes, a recog.

THE COURT: But it's got other conditions of reporting?

MR. REILLEY: Yes, sir, and he's been doing that faithfully.

THE COURT: He will have those same conditions of reporting to her. You understand that.

DEFENDANT SALADINO: Yes, I understand, your Honor.

MS. BROWN: Your Honor, do you want to make clear who he should be reporting to? I'm assuming the Bureau of Prisons is going to want the most updated report upon designation. I'm not convinced they will wait ten months to designate him. Once the --

THE COURT: I'm not sure that they will, either. That's why I want him to talk to Mr. Cunneen so that maybe they'll wait for four weeks or eight weeks so that they get an idea of his medical treatment.

MS . BROWN: Okay.

MR. REILLEY: Shall do. Judge.

THE COURT: So, she can give you his phone number, Mr. Cunneen.

All right. Is there anything else?

MR. IASPARRO: Not from the government. Judge.

MR. REILLEY: We're all set. Judge. Thank you very much.

THE COURT: Okay. That's all.

MR. REILLEY: Thank you.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

App. 55

[DOCKETED March 29, 2004]

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

JOSEPH W. SALADINO, JR.

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: 03 CR 50016-1
James W. Reilly
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1 & 2

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	18 USC §§ 922(g)(1) & 924(a)(2)
Nature of Offense	FELON IN POSSESSION OF FIREARMS
Date offense Concluded	02/15/1997
Count Number(s)	1

Title & Section	18 USC §§ 922(o)(1) & 924(a)(2)
Nature of Offense	POSSESSION OF A MACHINE GUN
Date offense Concluded	02/15/1997
Count Number(s)	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 325-40-5663

Defendant's Date of Birth: 10/11/1945

Defendant's USM No.: 12411-424

Defendant's Residence Address:

1303 MONTAGUE STREET

ROCKFORD, IL 61102

Defendant's Mailing Address: SAME

Date of Imposition of Judgment: 03/25/2004

Signature of Judicial Officer: /s/ Philip G. Reinhard

Name and Title of Judicial Officer: Philip G. Reinhard
U.S. District Judge

Date: March 25, 2004

DEFENDANT: JOSEPH W. SALADINO, JR.

CASE NUMBER: 03 CR 50016-1

STATEMENT OF REASONS
(Not for Public Disclosure)

X The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	18
Criminal History Category:	I
Imprisonment Range:	27 to 33 months
Supervised Release Range:	2 to 3 years
Fine Range:	$6000. to $60,000.

X Fine waived because of inability to pay.*

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* Guideline calculations hand-written in original; paragraphs regarding restitution as appearing on original omitted because not applicable to petitioner.

DEFENDANT: JOSEPH W. SALADINO, JR.
CASE NUMBER: 03 CR 50016-1

STATEMENT OF REASONS
(Not for Public Disclosure)

X The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

Reasons stated in open court and are summarized as follows:

Low end of guideline range imposed because:

1—Defendant's health - just underwent triple by-pass

2—Defendant previously prosecuted for same offense in state court - convicted and sentenced in state court already.

3—Defendant not indicted until 5 years after offense conduct and not served with that indictment until almost 1 year later.*

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* Reasons stated hand-written in original.

Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

No. 04-1164

In the Supreme Court of the United States

JOSEPH W. SALADINO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case

for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

MARCH 2005

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* The government waives any further response to the petition unless the Court requests otherwise.